IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 23RD NOVEMBER 2006 / 2ND AGRAHAYANA 1928

SA.No. 78 of 1993(A)

AS.42/1989 of SUB COURT, PAYYANNUR
OS.353/1985 of MUNSIFF COURT, THALIPARAMBA

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APPELLANT:

PULLANHI MADHAVIKUTTY, D/O.KRISHNAN NAIR,
RESIDING AT TP.VIII-455, TRICHAMBARAM DESOM,
TALIPARAMBA.

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BY ADV. SRI.K.V.SOHAN

RESPONDENTS:

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1. KUNDUMKARA CHANDU, S/O.KUNDUMKARA NARAYANAN,
PEON, RESIDING AT TP.VIII-433, TRICHAMBARAM
DESOM, TALIPARAMBA.

2. KUNDUMKARA KALLIANI, KUNDUMKARA HOUSE,
TRICHAMBARAM, TALIPARAMBA.

3. DO. NARAYANAN, KUNDUMKARA HOUSE,
TRICHAMBARAM, TALIPARAMBA.

4. DO. BALAKRISHNAN, RESIDING AT DO. DO.

(DIED - RECORDED AND LEGAL REPRESENTATIVES
IMPLEADED)

5. DO. LAKSHMIKUTTY, W/O.MARATI RAGHAVAN,
RESIDING AT DO. DO.

ADDL.R6- K.OMANA, D/O.KAUMALAKKAL PADINJAREVEETTIL
NARAYANAN, KADANNAPPILLY AMSOM,

CHERUVACHERI DESOM, P.O., MATHAMANGALAM.

ADDL.R7- ANURADHA (MINOR), D/O.BALAKRISHNAN, DO. DO.

ADDL.R8- AJITHA (MINOR), D/O.BALAKRISHNAN, DO.

ADDL.R9- ARUN (MINOR), S/O.BALAKRISHNAN, DO.

(MINORS, ADDL.RESPONDENTS 7 TO 9 ARE REPRESENTED BY GUARDIAN MOTHER ADDL.R6)

(IT IS RECORDED THAT THE 4TH RESPONDENT DIED AND ADDITIONAL RESPONDENTS 6 TO 9 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES AS PER ORDER DATED 4-7-2002 IN CMP 1158/93)

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.K.JAYAKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 21/11/2006, THE COURT ON 23-11-2006 DELIVERED THE FOLLOWING:

Thottathil B. Radhakrishnan, J.

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S.A.No.78 of 1993 & Cross-objection

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Dated this the 23rd day of November, 2006.

JUDGMENT

The appellant plaintiff filed the suit for declaration of an alleged easement right and for a decree of mandatory injunction for removal of an obstruction allegedly caused over the said pathway. The courts below have concurrently dismissed the plaintiff's claim.

2. Before me, the parties have referred to Ext.C1 plan of the Commissioner as also Ext.B1.

3. Going by Ext.C1, plots A, B, C and D in that sequence lies from west to east. To the west of Plot 'A' is an open space, which is recorded as a waste compound, in Ext.C1. The National Highway runs on the west of the said open compound. To the east of Plot D is a road, which gets connected to the National Highway by means of a link road on the northern aspect of the aforesaid properties. Plot 'D' has access from the

road on its east. Plot 'C' also has an access through plot 'D'. The courts below have found that there is a newly erected gate between plots 'B' and 'C'. 'C' is a plot sold to its present holder by the plaintiff from out of what was held by her alongwith Plot 'B'.

4. The plaintiff's case is that from the point 'X' aside the National Highway on the west, a pathway runs eastword to X-1, turns northward to X-2, turns again eastword towards X-3, further turns northword towards X-4 and angles off through X-5 and X-6 to reach plot 'B'. The zig zag alignment of the alleged pathway over which easement is pleaded is attempted to be projected as an easement by prescription. It runs between the dwelling houses, the latrine, well etc. in plot 'A'. Even a cursory perusal of Ext.C1 would show that use of a pathway as X, X1, X2, X3, X4, X5 and X6 is wholly against common course of human conduct. It is attempted to be pointed out on the basis of certain prior documents produced as additional evidence in the first appellate stage that the entire holding was a single unit and that the predecessor in interest of the

plaintiff had a right of way over plot 'A'. The predecessor, first, sold plot 'A' to the defendants. No right of way is shown to have been reserved by the said vendor. Later on, he sold the plot comprising of plots 'B' and 'C' in Ext.C1 to the plaintiff, who later on, carved out 'C' plot and sold it to yet another person. Ext.B1 is a rough sketch produced by the plaintiff along with the plaint and marked during the plaintiff's cross examination. It contains the admission regarding the existence of a pathway from the road on the west of plot 'D' through plots 'D' and 'C'. So much so, the courts below accepted the version of the defendants that the right of way of the plaintiff could have been only through plots 'C' and 'D' and at any rate not through plot 'A', as pleaded by the plaintiff. 'A' schedule and 'B' schedule cannot be treated as having given rise to an easement by necessity. It was not even so pleaded by the plaintiff. In so far as the easement by prescription is concerned, the courts below had come to the conclusion that the plaintiff had miserably failed in establishing the easement sought to be made out through

plot 'A'. Under such circumstances, even the additional evidence admitted by the lower appellate court, that too without stating any reasons, though obligatory under Order XLI Rule 27, do not advance the case of the plaintiff.

5. In the aforesaid circumstances, no question of law, much less a substantial one, arises for decision in this second appeal. The impugned decree and the judgments have been passed on an appreciation of the evidence on record, which consideration cannot be treated as perverse, warranting interference under Section 100 of the Code of Civil Procedure.

6. In the result, the appeal fails and the same is dismissed with costs throughout.

In view of the aforesaid, no separate orders being called for on the cross objection filed on the question of costs, the same is closed.

Thottathil B.Radhakrishnan,
sl. Judge.

Thottathil B. Radhakrishnan, J.

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S.A.No.78 of 1993
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JUDGMENT

Dated:23-11-2006